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No. 03-
(CAPITAL CASE)

In the
SUPREME COURT OF THE UNITED STATES
October term, 2003

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW
(Capital Case)

The Supreme Court of Missouri departed from this Court's holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989), in which the Court upheld statutes under which the minimum age for capital punishment is sixteen. The Missouri court's decision raises two questions:

1. Once this Court holds that a particular punishment is not "cruel and unusual" and thus barred by the Eighth and Fourteenth Amendments, can a lower court reach a contrary decision based on its own analysis of evolving standards?

2. Is the imposition of the death penalty on a person who commits a murder at age seventeen "cruel and unusual," and thus barred by the Eighth and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

Petitioner, Donald P. Roper, is the Superintendent of the Potosi Correctional Center, Missouri, where Respondent Christopher Simmons is confined.

Respondent Simmons is a prisoner in state custody pursuant to his conviction for first degree murder for which the jury sentenced him to capital punishment. He was the petitioner in the habeas corpus proceeding in the Supreme Court of Missouri.

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The August 26, 2003 decision of the Supreme Court of Missouri, from which petitioner seeks review, is reported at 112 S.W.3d 397 and is published in the Appendix at App. A-2.

JURISDICTION

The opinion of the Supreme Court of Missouri was issued on August 26, 2003. Petitioner invokes this court's jurisdiction under 28 U.S.C. §1257(a) (2000). The court below had jurisdiction under its own Rules 91.01(b) and 92.02(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitution of the United States, Amendment XIV, Section 1:

> [Nor] shall any state deprive any person of life, liberty or property without due process of law . . . .

Mo. Rev. Stat. § 565.020 (1994):

> 1. A person commits the crime of murder in the first degree if he knowingly

causes the death of another person after deliberation upon the matter.

2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; ex ept that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

Missouri Supreme Court Rule 91.01(b):

Any person restrained of liberty within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint.

STATEMENT OF THE CASE

Respondent Christopher Simmons was convicted of a murder he committed while seventeen years of age. After his conviction was upheld, he sought a writ of habeas corpus from the Supreme Court of Missouri. That court granted the writ and resentenced Simmons to life imprisonment. In doing so, the court relied on the Eighth Amendment to the United States Constitution – despite contrary, binding precedent from this Court.

1. The Murder

In early September 1993, Simmons, then age seventeen, discussed with his friends, Charlie Benjamin (age fifteen) and John Tessmer (age sixteen), the possibility of committing a burglary and murdering someone. On several occasions, Simmons described the manner in which he planned to commit the crime: he would find someone to burglarize, tie the victim up, and ultimately push the victim off a bridge. Simmons assured his friends that their status as juveniles would allow them to "get away with it."

On September 8, 1993, Simmons arranged to meet Benjamin and Tessmer at around 2:00 a.m. the following morning for the purpose of carrying out the plan. The trio met at the home of Brian Moomey, a twenty-nine year old convicted felon. Tessmer refused to go with Simmons and Benjamin. He returned home, while Simmons and Benjamin went to commit a burglary.

The two found a back window cracked open at the rear of Shirley Crook's home. They opened the window, reached through, unlocked the back door, and entered the house. Moving through the house, Simmons turned on a hallway light. The light awakened Mrs. Crook, who was home alone. She sat up in bed and asked, "Who's there?" Simmons entered her bedroom and recognized Mrs. Crook as a woman with whom he had previously had an automobile accident. Mrs. Crook apparently recognized Simmons as well.

Simmons ordered Mrs. Crook out of her bed and, when she did not comply, Simmons forced her to the floor with Benjamin's help. While Benjamin guarded Mrs. Crook in the bedroom, Simmons found a roll of duct tape, returned to the bedroom and bound her hands behind her back. The two also taped Mrs. Crook's eyes and mouth shut. They walked Mrs. Crook from her home and placed her in the back of her minivan. Simmons drove the van from Mrs. Crook's home in Jefferson County to Castlewood State Park in St. Louis County.

Simmons parked the van near a railroad trestle that spanned the Meramec River. When he and Benjamin began to unload Mrs. Crook from the van, they discovered that she had freed her hands and had removed some of the duct tape from her face. Using Mrs. Crook's purse strap, the belt from her bathrobe, a towel from the back of the minivan, and some electrical wire found on the trestle, Simmons and Benjamin bound Mrs. Crook again, restraining her hands and feet and covering her head with a towel. Simmons and Benjamin walked Mrs. Crook to the railroad trestle.

There, Simmons bound her hands and feet together, hog-tied fashion, with the electrical cable and covered Mrs. Crook's face completely with duct tape. Simmons then pushed her off the railroad trestle into the river below. At the time she fell, Mrs. Crook was alive and conscious. Simmons and Benjamin threw Mrs. Crook's purse into the woods and drove the van back to the mobile home park across from the subdivision in which Mrs. Crook lived.

Later that day, Simmons went to Moomey's trailer and bragged to Moomey that he had killed a woman "because the bitch seen my face." In the meantime, Steven Crook, Shirley's husband, returned home from an overnight trip and discovered that his wife had not gone to work as scheduled. When he did not hear from his wife by that evening, he filed a missing person's report.

That same afternoon, two fishermen found a body floating in the Meramec River, three quarters of a mile down stream from the railroad trestle. The fishermen notified authorities, who removed the body. The medical examiner identified the body from fingerprints, determined the cause of death as drowning and noted that the victim was alive prior to being pushed from the bridge. The examiner also reported that Mrs. Crook had sustained several fractured ribs and considerable bruising and that these injuries did not result from her fall from the railroad trestle.

The next day, September 10, police received information that Simmons was involved in the murder. They arrested Simmons and took him to the Fenton

Police Department. Police read Simmons the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Simmons waived his constitutional right to counsel and, after a little less than two hours of questioning, confessed to the murder. He also agreed to videotape a confession and to take part in a videotaped "reenactment" of the murder at the crime scene (Appendix A-57 to A-60).

2. The Trial, Post-conviction Proceedings, Appeals, and Federal Habeas

At trial, the jury found Simmons guilty of first degree murder and recommended a sentence of death. The jury found three statutory aggravating circumstances in the murder of Shirley Crook: (1) it was committed for the purpose of receiving money or any other thing of value, (2) it was committed for the purpose of avoiding, interfering with or preventing a lawful arrest of Simmons; and (3) it involved depravity of mind, and as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. The murder involved depravity of mind because Simmons killed Shirley Crook after she was bound, thereby exhibiting a callus disregard for human life. The trial court sentenced Simmons to death.

Simmons filed a motion for post-conviction relief under Missouri Supreme Court Rule 29.15. After an evidentiary hearing, the court denied the motion.

Simmons pursued a consolidated appeal with the Supreme Court of Missouri. That court affirmed Simmons' conviction and sentence and affirmed the denial of post-conviction relief. *State v. Simmons*, 944 S.W.2d 165 (Mo. banc 1997) (Appendix A-56). This court denied review. *Simmons v. Missouri*, 522 U.S. 953 (1997).

Simmons pursued federal habeas corpus relief under 28 U.S.C. §2254 (2000). The United States District Court for the Eastern District of Missouri denied the petition for writ of habeas corpus. *Simmons v. Bowersox* , No. 4:97-CV-2415 JCH (E.D. Mo. Aug. 5, 1999). The United States Court of Appeals for the Eighth Circuit affirmed the denial of habeas relief. *Simmons v. Bowersox*, 235 F.3d 1124 (8th Cir. 2001). This court denied review. *Simmons v. Bowersox*, 534 U.S. 924 (2001).

3. State Habeas

The present litigation began on May 3, 2002, when Simmons filed a petition for writ of habeas corpus with the Supreme Court of Missouri pursuant to that court's Rules 91.01(b) and 91.02(b) (Appendix A-121). After receiving memoranda from Simmons and the state, the court issued a writ of habeas corpus (Appendix A-141); the state then filed a return.

On August 26, 2003, the Missouri court set aside Simmons' death sentence and resentenced him to life imprisonment without eligibility for probation, parole or relief except by act of the Governor (Appendix A-5). According to the Missouri court, Simmons' Eighth Amendment rights were violated by his capital sentence because he was seventeen when he murdered Mrs. Crook. Writing for the dissent, Judge Price found the issue resolved by this court's decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989).

REASONS FOR GRANTING THE WRIT

The Court should issue a writ of certiorari for three reasons.

The first arises from the implicit assertion by the Supreme Court of Missouri of a novel interpretation of the law regarding the value of this Court's precedent. The Missouri court has in effect held that it is not bound by this Court's prior holdings as to what constitutes "cruel and unusual punishment" in violation of the Eighth Amendment. Turning over the responsibility for defining "cruel and unusual punishment" to the lower courts would wreak havoc and sow inequity throughout the nation.

The second reason arises from the Missouri court's ultimate conclusion: that imposing capital punishment on a seventeen-year-old who thumbs his nose at the law while committing a heinous murder violates the Eighth Amendment. That conclusion is contrary to not just this Court's holding in *Stanford v. Kentucky*, 492 U.S. 361 (1989), but to many holdings in state and federal courts that rely on the *Stanford* decision. The conflict among those decisions, like the assertion of the authority to depart from *Stanford*, promises confusion and inequity.

And third, even independent of that conflict, the question of the age at which capital punishment may be applied is an important one – particularly in an era when the imposition of adult penalties on juvenile offenders has become more common.

I. The Missouri court's rationale permits lower courts to depart from this Court's Eighth Amendment precedents based on their own evolving and subjective views of what constitutes "cruel and unusual punishment."

In *Stanford v. Kentucky*, this Court held that the Eighth and Fourteenth Amendments did not prohibit imposition of capital punishment for murder committed at age sixteen or seventeen. 492 U.S. at 370-77. The decision in *Stanford* has not been overturned by this court, even though the Court has had recent opportunities to do so. See *Mullin v. Hain*, 538 U.S. ___, 123 S.Ct. 1654 (2003) (Mem. Order) (order granting application to vacate the stay of execution of defendant who was seventeen years old when he committed murder); *In re Stanford*, 537 U.S. 968 (2002) (denying writ of habeas corpus of petitioner who was seventeen years old when he committed murder); *Patterson v. Texas*, 536 U.S. 984 (2002) (denying writ of habeas corpus of petitioner who was seventeen years old when he committed murder).

Decisions of this Court interpreting the Constitution are, of course, the supreme law of the land. U.S. Const. Article VI; *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). And "it is this Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997). That is true even if the "'changes in judicial doctrine' ha[ve] significantly undermined this Court's prior holding," *United States v. Hatter*, 532 U.S. 557, 567 (2001), quoting *Hatter v.*

United States, 64 F.3d 647, 650 (Fed. Cir. 1995), even if the Court's prior holding "appears to rest on reasons rejected in some other line of decisions," *Rodriguez De Quinas v. Shearson/American Express*, 490 U.S. 477, 484 (1989), and even if this Court's holding rests on "'increasingly wobbly, moth-eaten foundations,'" *State Oil Co. v. Kahn*, 522 U.S. at 20, quoting *Kahn v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996).

By reaching a conclusion diametrically opposed to the holding in *Stanford v. Kentucky*, the Supreme Court of Missouri may have rejected that rule outright – a rejection that would merit summary reversal. But more likely, the Missouri court has carved out an exception to the rule – *i.e.*, it has concluded that the rule does not apply in the Eighth Amendment context. That exception leaves lower courts free to create their own definitions of "cruel and unusual punishment." And there is little likelihood that state and federal courts would reach unanimity on the most serious questions regarding Eighth Amendment protections.

The Missouri court departed from *Stanford* by following a rationale – not a holding – that it derived from *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). The court concluded that the Eighth Amendment's evolving "standards of decency" are fluid. Appendix A-19 to A-20. Of course, the departure from *Stanford* lacks support in *Atkins*. Indeed, the premise that *Atkins* might have overruled *Stanford* was seemingly rejected by this court in *Atkins*. *Atkins v. Virginia*, 536 U.S. at 316 n.18. And one searching the analysis in *Atkins*, finds no basis there to carve out Eighth Amendment cases from the time-honored principles of stare decisis.

Nor would one find such a basis in other decisions of this Court. Indeed, while current Eighth Amendment analysis requires that the amendment "draw its meaning from the evolving standards of decency that mark the progress of maturing society," *Atkins v. Virginia*, 536 U.S. at 311-12 quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958), there is no Supreme Court decision since *Trop* that suggests that this Court's Eighth Amendment precedents lose their binding effect as standards of decency "evolve."

To allow that result – to permit lower courts to ignore the precedential value of this Court's Eighth Amendment decisions – would authorize lower courts to rule that a penalty does or does not violate the Eighth Amendment based on those courts' independent notions of evolving standards of decency instead of resolving the question based upon this Court's precedent. But Eighth Amendment precedent from this Court should be precedent, not merely a starting point of analysis of evolving standards of decency. Offenders threatened by capital sentences and the states imposing such sentences should be able to rely upon precedent from this Court to define what is permissible under the Eighth Amendment – precisely as the Missouri Legislature relied upon *Stanford v. Kentucky* when, in 1990, it amended Mo. Rev. Stat. § 565.020 (1994) to prohibit capital punishment for those who murder before their sixteenth birthday. *Compare* Mo. Rev. State § 565.020.2 (1986) with § 565.020.2 (1994).

The need for assurance, consistency, and continuity in the application of the Eighth Amendment is not limited, of course, to the context of capital cases.

Indeed, the Missouri Supreme Court's implicit holding that the Eighth Amendment permits an exception to the rule that this Court's precedents remain binding is not logically limited to that context. And there is nothing unique to Missouri or to this case to suggest that the path chosen by the Missouri Supreme Court will not be inviting to other courts. Thus courts following that path may hold that any number of this Court's Eighth Amendment precedents are no longer binding, *i.e.*, that what this Court declared not to be "cruel and unusual" has now become such. Indeed, if the Missouri path remains unblocked, there will be no logical barrier to courts holding that acts this Court once held to be "cruel and unusual" no longer fit that description. Again, that would sow inequity and wreak havoc throughout the justice system. This Court should grant the petition and prevent that result.

II. The Missouri holding conflicts not just with *Stanford v. Kentucky*, but also with post-*Atkins* decisions by other state and federal courts.

At the time of Simmons' trial, the question of whether his Eighth and Fourteenth Amendment rights would be violated by a capital punishment sentence because he murdered when he was seventeen years old appeared to have been decided in *Stanford v. Kentucky* and its companion case from Missouri, *Wilkins v. Missouri*, 487 U.S. 1233 (1988). The *Stanford* rule – permitting death penalty statutes that exclude those younger than sixteen from the death penalty – was apparently binding throughout the United States. By holding that *Stanford* no longer applies to claims made in Missouri under the Eighth Amendment because of

Atkins, (App. A-19 to A-21), the Missouri Supreme Court has created a conflict with *Stanford*, and it has created a conflict with post-*Stanford*, post-*Atkins* decisions from other states. That conflict merits this Court's attention.

On the same day the Missouri Supreme Court issued its decision, the Court of Appeals for the Fifth Circuit issued a conflicting, unpublished decision in *Villarreal v. Dretke*, No. 03-20248. In *Villarreal*, the offender was seventeen years old when he murdered a fourteen year old girl. The offender sought federal habeas relief by arguing that his Eighth Amendment rights were violated by the execution of one who was younger than eighteen when he murdered. *Id.*, slip op. at 2-3. Relying on *Stanford*, the Fifth Circuit denied relief:

> Although decided well before the *Atkins* decision, the Supreme Court addressed and rejected arguments similar to Villarreal's, namely arguments against the execution of certain juveniles based on evolving standards of decency and the mental capacity of juveniles in *Stanford v. Kentucky*, 492 U.S. 361 (1989). This decision has not been overruled and Villarreal's arguments fall within the *Stanford* holding. . . .

Id., slip op. at 3-4. The court specifically rejected the Missouri court's conclusion that *Atkins* opened the door to departure from *Stanford*:

> [T]here is nothing in the Supreme Court's *Atkins* opinion overruling or changing

> *Stanford* and any application of *Atkins* or the rationale employed by the Supreme Court in *Atkins* to Villarreal's petition is a decision only the Supreme Court can make.

Id., slip op. at 4.

Three days after the Missouri Supreme Court and the Fifth Circuit issued their conflicting decisions, the Alabama Court of Criminal Appeals took the Fifth Circuit's route, relying on *Stanford v. Kentucky* to uphold the death sentence of a defendant who was seventeen years old when he killed. *Adams v. State*, 2003 WL 22026043 (Ala. Crim. App. Aug. 29, 2003) at *60.

Six months before, the Mississippi Supreme Court took that same route, denying relief to an offender who was seventeen years old when he killed. *Foster v. State*, 848 So.2d 172 (Miss. 2003). Using language similar to that of the Fifth Circuit in *Villarreal*, that court expressly rejected the idea that *Atkins* had opened the door to a departure from *Stanford*:

> Foster argues that the same national consensus that caused the United States Supreme Court to ban the execution of the mentally retarded in *Atkins* also exists in opposition to execution of those who committed their crimes as juveniles, and this Court should recognize such a prohibition at this time. This Court finds that the United States

> Supreme Court has prohibited the execution of those who committed their crimes at age fifteen in *Thompson v. Oklahoma*, 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), but declined in *Stanford v. Kentucky* . . . to do so for those who committed their crimes at age sixteen or seventeen.

Id. at 175-76.[1]

At the very least, then, persons in Missouri are treated differently, vis-a-vis this Court's *Stanford* precedent, than are persons in Mississippi, Texas, and Louisiana. That inequity would be enough to demand review of this Court. But again, it is only the beginning, for the Missouri precedent opens the door for other courts to depart not just from *Stanford*, but from this Court's precedents on other Eighth Amendment questions. That conflicts of this sort will multiply, as other courts follow the trail blazed by the Missouri Supreme Court, is certain.

III. The question of a minimum age for imposition of capital punishment is an important one that merits review.

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[1] Also, five months after *Atkins* was decided, the Louisiana Supreme Court dismissed in a brief footnote the possibility that *Atkins* modified *Stanford* – albeit without discussion, and without any suggestion that the defendant had made such a claim. *State v. Williams*, 831 So.2d 835, 857 n. 32 (La. 2002).

It is simply untenable to leave open the question of the age at which the death penalty can constitutionally be applied. The importance of a firm, national answer to that question explained this Court's grant of certiorari review in *Stanford* fourteen years ago. *See Stanford v. Kentucky*, 492 U.S. at 368 citing *Stanford v. Kentucky*, 488 U.S. 887 (1988). That the matter retains its importance is shown by the repeated requests that this court reconsider the answer it gave in *Stanford*. *See* page 9, *supra*.

The need to provide clear constitutional rules regarding the imposition of the death penalty (and perhaps other penalties) on those under or even at age 18 has grown, not diminished, since this Court decided *Stanford*. In 1994, the number of juvenile court cases sent into adult criminal court rose to 12,300. Carol DeFrances and Kevin Strom, Juveniles Prosecuted in State Criminal Courts (DOJ-BJS March 1997). Eleven percent of the juveniles sent into criminal court were charged with murder. Kevin Strom, Steven Smith and Howard Snyder, Juvenile Felony Defendants in Criminal Courts 2 (DOJ-BJS Sept. 1993).

In the death penalty context, at least, *Stanford* provided a clear constitutional rule. The Missouri Supreme Court's decision in this case eliminated that clarity. The Court should grant the petition and remove the analytical debris left by the Missouri court's attack.

CONCLUSION

For the foregoing reasons, petitioner prays the court grant the petition for writ of certiorari.

Respectfully submitted,

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